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IMPORTS AND SECTION 7 OF THE CLAYTON ACT

Gertrude Susan Rosenthal[†]

Federal law dealing with acquisitions, despite frequent protestations to the contrary, is quite limited. Section 7 of the Clayton Act,¹ the usual statutory basis for an attack on an acquisition or merger,² covers only those transactions the effect of which "may be substantially to lessen competition or to tend to create a monopoly" in any line of commerce "in any section of the country."³ Although section 7 raises a myriad of questions, one of particular importance in recent years has been whether foreign imports⁴ should be considered in determining the legality of an acquisition by one American company of another.

This question has been squarely faced only once;⁵ on that occasion⁶ the court held that imports should be included. In addition, a number of courts have included imports in determining the effect of an acquisition without considering whether such an approach is proper. The antitrust enforcement agencies, on the other hand, have urged both sides of this question. As imports become an increasingly significant factor in the United States economy, the

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¹ 15 U.S.C. § 18 (1970).

² The Department of Justice has explained that "[a]lthough mergers or acquisitions may also be challenged under the Sherman Act, commonly the challenge will be under Section 7 of the Clayton Act." U.S. DEP'T OF JUSTICE, MERGER GUIDELINES 1 (1968) [hereinafter cited as MERGER GUIDELINES]. Occasionally, an acquisition or merger may be attacked under § 1 of the Sherman Act. 15 U.S.C. § 1 (1970); see *United States v. First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1967). The requirements for finding a violation of § 1 differ in some material respects from those of § 7 and, insofar as they are relevant to this Article, will be discussed hereinafter. See notes 16 & 119 *infra*.

Sometimes the Federal Trade Commission (FTC) challenges an acquisition under § 5 of the Federal Trade Commission Act. 15 U.S.C. § 45 (1970). The same tests are generally applicable to § 5 and § 7 proceedings although the language of the statutes is different. See, e.g., *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882, 886 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973).

³ 15 U.S.C. § 18 (1970).

⁴ As used in this Article, the term "imports" is intended to have a broad meaning. It is used to denominate goods produced in the United States by foreign companies, as well as goods actually manufactured abroad by foreign or American companies. See note 8 and accompanying text *infra*.

⁵ *American Smelting & Refining Co. v. Pennzoil*, 295 F. Supp. 149, 153 (D. Del. 1969).

issue of whether they should be considered in determining the effect of an acquisition grows in importance.⁶ In some industries, the numbers of imports are of such magnitude that an acquisition might be ruled legal if imports were considered, but illegal if they were not.⁷

Theoretically, goods might be treated differently, depending upon whether they were: (1) imported by a company with no manufacturing facilities in the United States, (2) imported by a company whose principal office is in the United States, or (3) produced in the United States by a company whose principal offices are abroad.⁸ All of these possibilities will be considered in

⁶ See note 18 and accompanying text *infra*.

⁷ The question of inclusion or exclusion is especially important in cases involving industries that are dominated by foreign imports or in which foreign imports exceed total domestic production. In several cases dealing with such industries, courts have included imports in the relevant market in determining the validity of an acquisition. *See, e.g.,* United States v. Singer Mfg. Co., 374 U.S. 174, 196 (1963) (Court in determining that Singer, with 61.4% of relevant market, had violated Sherman Act, considered foreign imports relevant because relevant market had been "increasingly preempted by foreign manufacturers"); United States v. Branch River Wool Combing Co., 320 F. Supp. 1324, 1326 (D.R.I. 1971) (acquisition permitted despite prior consent decree, in part because of "substantial increase in imports of wool products" which caused "general decline" in domestic wool industry); United States v. Tidewater Marine Serv., Inc., 284 F. Supp. 324, 342 (E.D. La. 1968) (proposed merger held legal because, *inter alia*, it would permit American company to enter "burgeoning business of ocean towing of rigs"—market completely dominated by foreign firms with no real competition); Dresser Indus., Inc., 63 F.T.C. 250, 267, 278 (1963) (complaint dismissed in part because receipts of imported crude barite actually exceeded United States production of such ore).

The Department of Justice has expressly recognized the potency of imports as a force in maintaining domestic competition: "Particularly, in concentrated industries imports are an important and significant competitive force, and their elimination even if accompanied by some increase in export sales would not be justified." Memorandum concerning Antitrust and Foreign Commerce Submitted to the Senate Subcommittee on Foreign Commerce and Tourism by Deputy Assistant Attorney General Walker B. Comegys, January 24, 1972 in 5 TRADE REG. REP. ¶ 50,129 (U.S. Dep't of Justice 1972); *see* Part V *infra*.

⁸ *See, e.g.,* United States v. Atlantic Richfield Co., 297 F. Supp. 1060 (S.D.N.Y. 1969) (treatment of British Petroleum); United States v. British Petroleum Co., Civil No. 69-954 (N.D. Ohio, Jan. 1, 1970); United States v. Standard Oil Co., 1970 Trade Cas. ¶ 72,988 (FTC, consent decree). These cases stand for the proposition that a foreign company will be treated as a domestic company only after establishing facilities in the United States. *See also* Brief for Complaint Counsel, Litton Indus. Inc., [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,918 (1972). This brief adopts the same view as the foregoing cases. It further supports the proposition that foreign companies, with no manufacturing facilities in the United States but who are actual competitors in this country because of their sales efforts, will be treated as American companies. *Cf. W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS* 345, 351 (2d ed. 1973). Fugate, formerly chief of the Foreign Commerce Section of the Antitrust Division, states that cases involving foreign companies with United States facilities are treated as United States companies. He also states that all imports, regardless of source, are accorded the same treatment as articles manufactured in the United States. His suggestion that a distinction would be appropriate, however, quoted *infra*,

this Article. Although it has been suggested that shipments by foreign companies from abroad be treated differently from shipments by foreign companies from American plants and shipments by domestic concerns whether the goods are manufactured here or abroad,⁹ it is the author's contention that the better rule—and the one supported by the weight of authority—is that all such shipments should be treated in the same way.

I

THE STATUTORY SCHEME OF SECTION 7

A. General Considerations

The significance of imports in a section 7 case involving the acquisition of one domestic company by another can best be understood after a brief survey of the statutory scheme of that section. "Determination of the relevant product and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act."¹⁰ The first step in a determination of the legality of an acquisition is to find the appropriate line of commerce in which to test the acquisition.¹¹ This line of commerce or product market must be related to a section of the country or geographic area which is realistic with respect to the industry involved.¹² According to the Supreme Court,

suggests a possible dichotomy between imports by United States and foreign manufacturers. *Id.* at 351; see notes 117-18 and accompanying text *infra*.

⁹ This distinction was highlighted in the Brief for Complaint Counsel in *Litton Indus., Inc.*, [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,918 (1972). See also *W. FUGATE*, *supra* note 8, at 351.

¹⁰ *United States v. Marine Bancorp., Inc.*, 418 U.S. 602, 618 (1974).

¹¹ "The 'area of effective competition' must be determined by reference to a product market (the 'line of commerce')." *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). "In defining the product market . . . we must recognize meaningful competition where it is found to exist." *United States v. Continental Can Co.*, 378 U.S. 441, 449 (1964).

Of course, the fact that the acquiring and acquired companies do not deal in the same product does not prove that § 7 has not been violated. Vertical acquisitions—acquisitions of a source of supply or a customer—have long been the subject of successful attack under § 7. See, e.g., *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. Kennecott Copper Corp.*, 231 F. Supp. 95 (S.D.N.Y. 1964), *aff'd per curiam*, 381 U.S. 414 (1965). So-called conglomerate acquisitions also have been successfully attacked under § 7. See, e.g., *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965); *Kennecott Copper Corp. v. FTC*, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974); *United States v. R. J. Reynolds Tobacco Co.*, 268 F. Supp. 769 (D.N.J. 1966) (on discovery motion); *United States v. General Dynamics Corp.*, 258 F. Supp. 36 (S.D.N.Y. 1966) (after trial); *United States v. General Dynamics Corp.*, 246 F. Supp. 156 (S.D.N.Y. 1965) (on motion to dismiss); *United States v. Penick & Ford Ltd.*, 242 F. Supp. 518 (D.N.J. 1965) (on motion for preliminary injunction).

¹² In *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), the Court stated

Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must therefore both "correspond to the commercial realities" of the industry and be economically significant.¹³

It can be a part of a state or a metropolitan area,¹⁴ a single state, a multistate area,¹⁵ or the entire United States.¹⁶

The next step in the process is to determine whether the acquisition may have the proscribed effect—*i.e.*, a substantial lessening of competition in any line of commerce in any section of the country. In making that determination, judicial authorities, as well as the Department of Justice Merger Guidelines, mandate consideration of the acquiring and acquired companies' share of the relevant market, that is, the line of commerce in the section of the country.¹⁷ In evaluating the market shares of the companies involved, it is necessary to define the precise makeup of the universe of products, companies, and geographic areas that should properly be utilized to measure the effect of the acquisition being chal-

that before an acquisition is declared illegal, the geographic market must be defined, and that "under normal circumstances a delineation of proper geographic and product markets is a necessary precondition to assessment of the probabilities of a substantial effect on competition." *Id.* at 510. *See also* United States v. Connecticut Nat'l Bank, 418 U.S. 656 (1974); United States v. Marine Bancorp., Inc., 418 U.S. 602, 621 n.20 (1974).

¹³ Brown Shoe Co. v. United States, 370 U.S. 294, 336 (1962) (footnote omitted).

¹⁴ *See, e.g.*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

¹⁵ *See, e.g.*, United States v. Pabst Brewing Co., 384 U.S. 546 (1966). In that case, the Supreme Court, in addition to determining that a multistate area was an appropriate geographic market, also held the nation and a single state area to be appropriate geographic markets. As the Court pointed out, however, the section of the country need not be delineated "by metes and bounds as a surveyor would lay off a plot of ground." *Id.* at 549 (footnote omitted).

¹⁶ *See, e.g.*, United States v. Continental Can Co., 378 U.S. 441 (1964). Under the Sherman Act, it has been held that the geographic market may extend beyond the political limits of the United States. For example, in the recent case of Honeywell, Inc. v. Sperry Rand Corp., 180 U.S.P.Q. 673 (D. Minn. 1973), the court found that "the geographic market is the United States and foreign markets." *Id.* at 746. It further found that the "relevant geographic markets for purposes of this lawsuit are the United States and the world market (a combination of the foreign and United States markets)." *Id.* at 747. For a fuller discussion of this case see note 119 *infra*.

It would seem that the outer limits of the geographic market in a § 7 case should be the United States, but this point is explored hereinafter. *See* notes 26-33 and accompanying text *infra*.

¹⁷ The Justice Department explained, in accordance with case authority, that "[i]n enforcing Section 7 against horizontal mergers, the Department accords primary significance to the size of the market share held by both the acquiring and the acquired firms." MERGER GUIDELINES 8. However, as the Supreme Court pointed out in its recent decision in United States v. General Dynamics Corp., 415 U.S. 486, 498 (1974): "In *Brown Shoe v. United States*, [370 U.S. 294 (1962)], we cautioned that statistics concerning market share and concentration, while of great significance, were not conclusive indicators of anticompetitive effects."

lenged.¹⁸ One or more of these elements is frequently the point of contention in section 7 litigation.

In the present analysis, however, only one issue is of concern. Should products imported into this country from abroad, whether produced by foreign-owned concerns or by foreign subsidiaries or affiliates of domestic concerns, be included in the universe constituting the relevant market?

B. *Delineation of the Geographic Market*

Frequently, companies that sell in a certain geographic area produce their goods elsewhere. There is a great deal of authority for the proposition that the geographic market should be defined not merely to include the location of production facilities of the companies but also to include an effective area of competition.¹⁹ The courts and the Federal Trade Commission (FTC) have described with some precision the method by which such a geographic market should be defined.²⁰ In a recent decision defining the scope of section 7, the Supreme Court stated that the relevant geographic market is "defined . . . as the area in which the goods or services at issue are marketed to a significant degree by the acquired firm."²¹ Other cases have defined the geographic market by considering the area in which both companies involved in the challenged acquisition, or even all companies in the industry, market or distribute their goods.²² Another approach has been to

¹⁸ The issue is whether the merger . . . will have probable anticompetitive effect within the relevant line of commerce. Market shares are the primary indicia of market power but a judgment under § 7 is not to be made by any single qualitative or quantitative test. The merger must be viewed functionally in the context of the particular market involved, its structure, history and probable future.

United States v. Continental Can Co., 378 U.S. 441, 458 (1964).

¹⁹ For example, in *United States v. Times Mirror Co.*, 274 F. Supp. 606 (C.D. Cal. 1967), *aff'd mem.*, 390 U.S. 712 (1967), the district court held the appropriate geographic market to be that which "encompasses virtually the entire area of circulation and home delivery overlap," not merely the area covering the publication sites of the two newspapers involved. 274 F. Supp. at 619. In *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867 (S.D.N.Y. 1965), the court pointed out that it saw no "reason for separating the New York metropolitan area from the balance of the country merely because the constituent banks were located" there. *Id.* at 917. See also *United States v. Connecticut Nat'l Bank*, 418 U.S. 656, 666-71 (1974). In the latter case, the Supreme Court stated that "it seems fair to assume that the area of significant competitive influence of some bank offices may extend beyond town boundaries," and ordered the district court, on remand, to "delineate the localized banking markets surrounding the sites where [the two banks] maintain their bank offices." *Id.* at 671.

²⁰ For a brief discussion of the FTC's definition see note 23 *infra*.

²¹ *United States v. Marine Bancorp., Inc.*, 418 U.S. 602, 620-21 (1974).

²² The significance of distribution patterns was highlighted in the recent decision in *Kennecott Copper Corp. v. FTC*, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974). There the court of appeals defined the market as the entire United States on the

use consumption patterns, *i.e.*, to consider the area to which buyers supplied by these companies can turn for the product.²³ Often both approaches are utilized in the same case.²⁴

ground that the various producers of the product involved "compete with each other throughout the United States." 467 F.2d at 71. Similarly, the district court in *United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530 (W.D. Pa.), *aff'd*, 320 F.2d 509 (3d Cir. 1963), found the entire United States to be the appropriate section of the country since all companies in the industry "sell machinery and equipment throughout the country." 218 F. Supp. at 550.

The court in *United States v. G. Heileman Brewing Co.*, 345 F. Supp. 117 (E.D. Mich. 1972), declared:

A relevant market is one that takes into account not only the product (the line of commerce) but also its geographic area of distribution (the section of the country) A geographic market must include commercial realities and at the same time be economically significant.

Id. at 120-21. The court further stated that transportation costs were a factor in defining the geographic market:

The one predominant characteristic for beer is cost of transportation, but we find from the evidence presented in this record that a properly located brewing company enjoying successful elements of demand for its product would find little difficulty reaching an eight-state area for a market.

Id. at 121. Accordingly, the court held the eight-state area to be the appropriate geographic market.

²³ The approach defining the geographic market by the area to which the buyer can turn for supplies has been spelled out clearly by the FTC. *Inland Container Corp.*, 66 F.T.C. 329, 359 (1964), *modified*, 69 F.T.C. 201 (1966). The case held that "the area in which the principal shipments of the acquired plant" are made should not be determinative in defining a section of the country. 66 F.T.C. at 363. Instead, it stated: "[W]e will give consideration to sources of supply for Louisville purchasers in delimiting the geographic market." *Id.* Previously, in *Luria Bros. & Co.*, 62 F.T.C. 243 (1963), the FTC had stated the "established view that the market is a sales area," but held that where there are many sources and few buyers, "the area wherein the purchases are made . . . comprises the relevant geographic market." *Id.* at 613. In *Luria*, the FTC explained the apparent dichotomy between its definition and that which utilizes the distribution area. Citing *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), it emphasized that when the product originates with a few and is sold to many, the geographic market is the area in which the seller effectively competes rather than the area to which the buyer can turn for the product. 62 F.T.C. at 613.

²⁴ For example, in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), the Supreme Court held that "[t]he 'area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.'" *Id.* at 359, quoting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (emphasis in original). This position was reiterated recently in *United States v. Connecticut Nat'l Bank*, 418 U.S. 656 (1974). The FTC, in *Permanente Cement Co.*, 65 F.T.C. 410 (1964), *superseded in part*, 67 F.T.C. 334 (1965), explained that the definition of a geographic market is a "two-step procedure." First, it is necessary to determine "the area of competitive overlap," where the acquired company made most of its sales and the acquiring company competed with it. 65 F.T.C. at 489, quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 357 (1963). Second, it is necessary to determine "the area 'to which purchaser[s] [located in the area of competitive overlap] can practicably turn for supplies.'" *Id.* at 489-90, quoting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). Similarly, in *Bowl America Inc. v. Fair Lanes, Inc.*, 299 F. Supp. 1080 (D. Md. 1969), the court included within the geographic market the "area in which the seller operates, and to which the purchaser (here the bowler) can practicably turn." *Id.* at 1090. In *United States v. Manufacturers Hanover Trust Co.*, 240 F.

The definition of the geographic market to encompass the entire area to which customers can turn for their goods is undoubtedly proper in certain cases.²⁵ Nevertheless, approaches suggested by a few cases, if pushed to their logical conclusion, could lead to an improper holding that the geographic market in a section 7 case can be broader than the United States.²⁶

In *United States v. International Telephone & Telegraph Corp. (Grinnell)*,²⁷ for example, the Government sought to support a claim that an acquisition violated section 7 on the ground that it would foreclose "competitors from foreign markets."²⁸ The court declared that "[t]he legal basis for this claim is doubtful, since Section 7 proscribes acquisitions the effect of which may be substantially to lessen competition 'in any section of the country.'"²⁹ In any event, the court did not need to resolve the legal question it posed, since it found the evidence that the acquisition would result in a competitive advantage inconclusive.³⁰ In another case, however, a geographic market extending beyond the borders of the United States was apparently adopted by a district court. In *United States v. Standard Oil Co. (New Jersey)*³¹ the court declared:

Supp. 867 (S.D.N.Y. 1965), the court explained that the phrase "any section of the country," contained in Clayton Act § 7, refers not to a definite geographic area of the country but to the geographic area of effective competition. [This] area depends first upon the geographic area in which competitors market the relevant products and second upon where, within the area of competitive overlap, the customer can practically turn for supplies.

Id. at 899. See also *United States v. General Dynamics Corp.*, 415 U.S. 486, 511 (1974) (Douglas, J., dissenting) (four members of Court apparently considered consumption and distribution patterns highly significant). Indeed, the Supreme Court, in *United States v. Marine Bancorp., Inc.*, 418 U.S. 602 (1974), despite its language defining the geographic market by the marketing area of the acquired company, also considered the area "to which local consumers can practically turn for alternatives." *Id.* at 619.

²⁵ See note 23 *supra*.

²⁶ It should be noted that the use of marketing or distribution patterns alone would not necessarily establish a geographic market including companies producing their goods abroad but importing them into the United States for sale. Only an approach utilizing consumption patterns—where customers can turn for supplies—would encompass these foreign companies. For example, if two New York companies which sell their goods in Canada were to merge, the geographic market utilizing distribution patterns could arguably encompass Canada, but not Europe where, conceivably, some companies selling in New York are located. If consumption patterns are relevant to a determination of the relevant market, then consideration would have to be given to manufacturers in all those areas to which New Yorkers look for their goods—conceivably including Europe.

²⁷ 306 F. Supp. 766 (D. Conn. 1969), *appeal dismissed*, 404 U.S. 801 (1971).

²⁸ *Id.* at 780.

²⁹ *Id.*

³⁰ "While the government asserts that foreclosure of Grinnell's competitors from foreign markets will result in substantial lessening of competition in the domestic market, the record is barren as to precisely how this will occur." *Id.* at 780-81.

³¹ 253 F. Supp. 196 (D.N.J. 1966).

United States producers sell potash for consumption, not only in the United States, but also in the rest of the Free World. Therefore, the market in which the potash producers must compete is measured by consumption in the United States and the rest of the Free World.³²

Despite the suggestions contained in these cases, it would be highly inappropriate to expand the market in a section 7 case beyond the United States. The conclusion seems inescapable that the statutory language "section of the country" limits the geographic market, at its broadest point, to the borders of the United States. This conclusion, however, does not automatically exclude from the market foreign companies selling in the United States. Regardless of the method used to define the geographic market—be it distribution patterns of the companies, consumption patterns of their customers, or a combination of both—the boundaries so established do not determine the identity of the companies included within that market.³³ Yet which companies should be included is an important question, deserving considerable attention.

³² *Id.* at 210. It should be noted, however, that in its conclusions, the court described the market at several places as "the United States potash market." *Id.* at 224, 227, 228.

Also noteworthy is *United States v. Standard Oil Co. (Indiana)*, 1964 Trade Cas. ¶ 71,215 (N.D. Cal.), in which the court dealt with the merger of two petroleum suppliers. It held that the "entire United States is the relevant market or section of the country." *Id.* at 79,847. But is also felt that the "total supply to which competing refiners may and do turn for their raw materials is the Free World crude oil production and reserves" except as limited by the Government. *Id.* at 79,865.

In *Vanadium Corp. of America v. Susquehanna Corp.*, 203 F. Supp. 686 (D. Del. 1962), the defendant argued that "data concerning exports is irrelevant," an issue quite different from that raised here. In rejecting the defendant's contention however, the court discussed the basic scope of § 7 in a way which could also be utilized in support of a claim that the market in a § 7 case should be extended beyond the United States. It stated that [t]he corporations, engaged in battle here, are selling goods for export and as such are in "a line of commerce" in the United States. "Commerce" includes "commerce * * * with foreign nations * * *." The Sherman Act includes unlawful combinations in restraint of export trade. Since § 7 of the Clayton Act is intended, as stated above, to "nip monopoly in the bud," and to enable the courts to switch on the red-light against incipient Sherman Act violations, it applies to the corporations engaged here in sales for export as well as for national consumption.

Id. at 696 (footnotes omitted). It is possible that the court was not concerned with competition outside this country but only with the competition in this country for sales outside this country.

³³ To illustrate, suppose Company A, which produces and sells widgets in geographic area X, acquires Company B, which also produces and sells widgets in area X. Unquestionably, the effect of the acquisition of B by A will be measured in terms of the widget product market in area X. Suppose, however, that Company C produces widgets in area Y and sells them in area X. Should Company C be included in the market? Suppose further that Company D produces widgets in area X but sells them only in area Z. Should Company D be included in the market? These kinds of questions arise regardless of how the geographic market is defined.

II

THE UNIVERSE

A. *Utilization of Sales Rather Than Production Data*

The approach generally used to evaluate the effect of an acquisition is to define the section of the country in general terms and rather narrowly, but to include in the market all sales made within that section.³⁴ Thus the acquiring company's share of the market is based on its percentage of all shipments in the area, regardless of their source. This approach, logically applied, would result in the inclusion of imports in the market.

The definition of the "section of the country" adopted in the Justice Department's Merger Guidelines³⁵ supports the utilization of sales figures. The Justice Department Antitrust Division generally has indicated its preoccupation with "sales" rather than "production."³⁶ Indeed, most cases generally center on sales statistics rather than production data. In *United States v. Von's Grocery Co.*,³⁷ which involved an attack on the merger of two supermarket chains, the Supreme Court's discussion of statistics was limited to the share of sales attributable to these companies in the relevant geographic market.³⁸

A number of district court cases have also considered all sales within the geographic market, regardless of source. In a case not involving imports from abroad, but raising the question of whether goods produced outside the geographic market should be included, the district court stated: "[I]n the sale and distribution of gasoline it is necessary to consider both the market area and the source of supply"³⁹ It therefore refused to "look to the

³⁴ See, e.g., *United States v. Continental Oil Co.*, 1965 Trade Cas. ¶ 71,557 (D.N.M.); cases discussed in notes 38-44 *infra*.

³⁵ The total sales of a produce or service in any commercially significant section of the country . . . or aggregate of such sections, will ordinarily constitute a geographic market if firms engaged in selling the product make significant sales of the product to purchasers in the section or sections.

MERGER GUIDELINES 6.

³⁶ "The market is ordinarily measured primarily by the dollar value of the sales or other transactions (e.g., shipments, leases) . . ." MERGER GUIDELINES 7. Instances where the Antitrust Division has not followed this principle will be discussed in detail hereinafter. See notes 132-51 and accompanying text *infra*.

³⁷ 384 U.S. 270 (1966).

³⁸ *Id.* at 273-74, 280. A similar approach was followed in *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 595 (1965), where the Court, relying only upon sales data, held that a so-called conglomerate acquisition was illegal because of the reciprocity it made possible. It is evident, of course, that the data most relevant in a reciprocity case is sales data.

³⁹ *United States v. Continental Oil Co.*, 1965 Trade Cas. ¶ 71,557 (D.N.M.).

production alone in New Mexico and shut its eyes to the importation of gasoline from other areas in determining the effect of the acquisition."⁴⁰

Another district court which considered sales data of prime significance explained that "[w]hile many levels of activity in the sugar industry can be identified, the conduct of sugar refiners in selling their product is here of prime relevance."⁴¹ It further emphasized that "sales activity in each [area] justifies an evaluation of the competitive factors of the merger in terms of its repercussions in these areas."⁴² And in still another case, the court, while mentioning that the companies involved in the action were manufacturers as well as sellers, utilized only sales figures, not production data, in determining the validity of the acquisition.⁴³

Shipments "into" an area have also been held to be highly significant in a number of FTC decisions. In a recent case, for example, the FTC included sales of a company with production facilities outside the relevant geographic market in determining the market shares of the merging firms.⁴⁴

B. *References to Production Data in Evaluating Acquisitions*

In some cases production statistics have been used, thereby excluding from the universe not only foreign companies, but also some domestic companies producing the relevant product outside of the relevant market area. These cases generally report sales statistics as well.

⁴⁰ *Id.* at 81,541. See also *United States v. Crowell, Collier & MacMillan*, 361 F. Supp. 983, 993 (S.D.N.Y. 1973); *United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061 (S.D.N.Y. 1969), *aff'd sub nom.*, *Bartlett v. United States*, 401 U.S. 986 (1971); *United States v. Lever Bros.*, 216 F. Supp. 887, 900 (S.D.N.Y. 1963); *United States v. Koppers Co.*, 202 F. Supp. 437, 442 (W.D. Pa.), *appeal dismissed*, 371 U.S. 856 (1962).

⁴¹ *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, 396 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958).

⁴² 152 F. Supp. at 398. In that case, some of the raw sugar cane was imported and subsequently refined in the United States. The plaintiff produced beet sugar, which it then sold; the defendant imported, refined, and sold cane sugar. When the defendant acquired a substantial block of the plaintiff's stock, the plaintiff sued for damages. The court found that the defendant's acquisition violated the Clayton Act.

⁴³ *Lunkenheimer Co. v. Condec Corp.*, 268 F. Supp. 667 (S.D.N.Y. 1967).

⁴⁴ *Golden Grain Macaroni Co.*, 78 F.T.C. 63 (1971), *aff'd in relevant part*, 472 F.2d 882 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973). For other FTC proceedings in which a company's percentage of all sales in a relevant market, regardless of source, has been included, see *FTC v. PepsiCo, Inc.*, 477 F.2d 24, 26 (2d Cir. 1973); *Ekco Products Co. v. FTC*, 347 F.2d 745, 749 (7th Cir. 1965); *Diamond Alkali Co.*, 68 F.T.C. 1204 (1965); *Beatrice Foods Co.*, 67 F.T.C. 473, 697 (1965); *Fruehauf Trailer Co.*, 67 F.T.C. 878, 929 (1965), *modified*, 69 F.T.C. 180 (1966); *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1049 (1962), *modified*, 67 F.T.C. 282 (1965).

Language supporting the use of production data can be found in the landmark decision of *Brown Shoe Co. v. United States*.⁴⁵ In that case, the Supreme Court majority defined a horizontal acquisition as "[a]n economic arrangement between companies performing similar functions in the *production or sale* of comparable goods or services."⁴⁶ In another case, the Supreme Court relied on data showing all sales in the relevant geographic market, regardless of source, to support its conclusion that the acquisition had an adverse effect on competition.⁴⁷ However, it also considered the decline in the number of companies producing the relevant product in the relevant geographic market.⁴⁸

The FTC's position on the weight to be given production statistics in section 7 cases is confusing. In some cases, it has adopted the view that production facilities, as well as sales percentages, should be taken into account.⁴⁹ In other cases, however, the FTC has disregarded production statistics almost entirely in favor of sales data.⁵⁰ The FTC apparently prefers to consider production data only on a case by case basis.

Occasionally district court decisions have considered production statistics, as well as sales statistics. In *United States v. National Steel Corp.*,⁵¹ the Government alleged that the acquiring and acquired companies were engaged in the production and sale of the product involved. The court considered competition for sales but, in rejecting the Government's claim in that case, it also looked to the production facilities of the various companies in the industry.⁵² Another court, in *Boyertown Burial Casket Co. v. Walco National Corp.*,⁵³ determined the validity of an acquisition by considering the

⁴⁵ 370 U.S. 294 (1962).

⁴⁶ *Id.* at 334 (emphasis added). The Government had initially attacked the merger of manufacturing as well as marketing facilities. The Supreme Court observed that the district court had found that the merger of manufacturing facilities was "economically too insignificant to come within the prohibitions of the Clayton Act" and noted that the Government had not appealed from that portion of the lower court's decision. *Id.* at 335.

⁴⁷ *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549-50 (1966); *see United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

⁴⁸ *United States v. Pabst Brewing Co.*, 384 U.S. 546, 550-51 (1966); *see United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973).

⁴⁹ *Brillo Mfg. Co.*, 56 F.T.C. 1672 (1960).

⁵⁰ *E.g.*, *Golden Grain Macaroni Co.*, 78 F.T.C. 63 (1971), *aff'd in relevant part* 472 F.2d 882 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973); *Procter & Gamble Co.*, 63 F.T.C. 1465, 1534 (1963), *rev'd*, 358 F.2d 74 (6th Cir. 1966), *rev'd*, 386 U.S. 568 (1967).

⁵¹ 251 F. Supp. 693 (S.D. Tex. 1965), *appeal dismissed*, 386 U.S. 1000 (1967).

⁵² *Id.* at 700-01.

⁵³ 344 F. Supp. 1357 (E.D. Pa. 1972).

company's share of all sales. However, it seemed to consider those companies which both sell and manufacture the product involved more significant than those companies which sell the product but do only a little manufacturing.⁵⁴ In *United States v. Northwest Industries, Inc.*,⁵⁵ on the other hand, the district court mentioned the companies' positions as producers, but relied solely on sales data in determining the validity of the acquisition.

Strong support for the proposition that production data should not be utilized to determine the effect of an acquisition if such data do not realistically reflect the competitive situation in the market⁵⁶ is found in the Supreme Court's 1974 decision in *United States v. General Dynamics Corp.*⁵⁷ There the government sought to rely upon production statistics in support of its claim that the challenged acquisitions of coal producers were illegal under section 7. The district court rejected statistics based "on past and present production,"⁵⁸ and relied instead on the quantity of uncommitted reserves owned by the companies. The Supreme Court affirmed by a vote of five to four.⁵⁹ The majority's position that the universe

⁵⁴ Thus the court carefully distinguished manufacturers according to the scope of their operations and held that

the acquisition or disappearance of a firm that fabricates and manufactures casket shells or completed units has a greater effect on competition . . . than does the decline in the number of jobbers who complete the shells and sell them to funeral directors.

Id. at 1363. See *United States v. Reed Roller Bit Co.*, 274 F. Supp. 573, 578 (W.D. Okla. 1967) (court relied on sales statistics, but mentioned respondent's position as producer); *Vanadium Corp. of America v. Susquehanna Corp.*, 203 F. Supp. 686 (D. Del. 1962) (court relied on both production and sales statistics). In *United States v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal. 1966), *aff'd*, 385 U.S. 37 (1966), the district court found the appropriate geographic market to be smaller than the United States because transportation difficulties limited distribution of the product involved. The court utilized both universes: sales and production. 253 F. Supp. at 137. In *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964), *rev'g* 214 F. Supp. 501, 507 (N.D.N.Y. 1963), the so-called "Rome Cable" case, the district court had also mentioned United States production capacity in the industry. See also *United States v. FMC Corp.*, 218 F. Supp. 817 (N.D. Cal. 1963) (court, without discussion, mentioned fact that companies manufactured and sold product involved).

⁵⁵ 301 F. Supp. 1066 (N.D. Ill. 1969).

⁵⁶ The focus of § 7 is on "competition." In the landmark *Brown Shoe* case, the Supreme Court stated that "[t]aken as a whole, the legislative history illuminates congressional concern with the protection of *competition*, not *competitors*." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original). There is nothing in the legislative history to indicate that Congress intended to limit the applicability of the section to competition from any particular source—i.e., to competition among domestic companies.

⁵⁷ 415 U.S. 486 (1974).

⁵⁸ *Id.* at 491.

⁵⁹ The majority pointed out that "[t]he focus of competition in a given time frame is not on the disposition of coal already produced but on the procurement of new long-term supply

should be measured by uncommitted reserves is of no help in most cases. The dissent did not disagree that production data were not useful in that case, but took no position on this point; it seemed to believe that data relating to sales, for which commitments were not previously made, were more realistic.⁶⁰

Some support for a rule permitting the use of production data only when they realistically reflect competition can be found in cases facing the question of relevance of production used internally. In *United States v. Aluminum Co. of America*,⁶¹ which was decided under the Sherman Act,⁶² the Second Circuit included Alcoa's internally-consumed production in measuring its position in the market.⁶³ More recently, however, in *American Smelting &*

contracts." *Id.* at 501. It explained that "to an increasing degree, nearly all coal sold to utilities is transferred under long-term requirements contracts, under which coal producers promise to meet utilities' coal consumption requirements for a fixed period of time, and at predetermined prices." *Id.* at 499. These sales "[did] not represent the exercise of competitive power but rather the obligation to fulfill previously negotiated contracts at a previously fixed price." *Id.* at 501. In that situation, the majority found that "a company's past ability to produce is of limited significance, since it is in a position to offer for sale neither its past production nor the bulk of the coal it is presently capable of producing . . ." *Id.* at 501-02. In most cases, the Supreme Court said, "the unstated assumption is that a company that has maintained a certain share of a market in the recent past will be in a position to do so in the immediate future." *Id.* at 501. But, as in the case before it, "[e]vidence of past production does not, as a matter of logic, necessarily give a proper picture of a company's future ability to compete." *Id.* The majority concluded that "[a] more significant indicator of a company's power effectively to compete with other companies lies in the state of a company's uncommitted reserves of recoverable coal." *Id.* at 502. The opinion then reviewed the available coal reserves for the companies involved and determined that the district court correctly held that the acquired company "was a far less significant factor in the coal market than the Government contended or the production statistics seemed to indicate." *Id.* at 503.

⁶⁰ Four members of the Court dissented in an opinion by Mr. Justice Douglas. The dissent took no position on the utilization of production data. However, it argued that defendant's share of production in the year before the acquisition was in excess of amounts recognized as illegal in other cases. *Id.* at 526-27 n.23. The dissenters rejected the majority's claim that the acquired company's weak reserve position "went to the heart of the Government's . . . prima facie case based on production figures," because, *inter alia*, this "weak reserve position" was "postacquisition evidence." *Id.* at 523-24. The dissent continued:

It might be argued, however, that, if market share is to be determined by sales, the production figures found by the court below are not the relevant ones for they include production which goes to meet obligations incurred in long-term contracts entered into in prior years. In terms of competition, if sales are the relevant criteria, what is needed is a finding of "new" sales (sales of previously uncommitted coal) as a percentage of total industry new sales

Id. at 527 n.23.

⁶¹ 148 F.2d 416 (2d Cir. 1945), *rev'd* 44 F. Supp. 97 (S.D.N.Y. 1941).

⁶² Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor

Sherman Act § 2, 15 U.S.C. § 2 (1970).

⁶³ The district judge had "excluded that part of 'Alcoa's' own production which it

Refining Co. v. Pennzoil United, Inc.,⁶⁴ the district court excluded production consumed internally from the market.⁶⁵

It is evident that there is some judicial authority supporting the proposition that production data can be of significance in a section 7 proceeding. If, in fact, production data are given controlling significance in a section 7 case, then foreign producers should be ignored, since the effect on competition must be considered within the framework of a "section of the country." None of these cases, however, supports such a result. Indeed, none of them resolves the question of whether it would be appropriate to hold an acquisition illegal if the acquiring and acquired companies had an excessive share of the total production in the geographic area, but only a small share of the sales, the difference being supplied by imports of the product. To rely on production data in such a case would unrealistically reflect the competitive situation and, under *General Dynamics*, would be improper.⁶⁶

fabricated and did not therefore sell as ingot." 148 F.2d at 424. The Second Circuit, in an opinion by Judge Learned Hand, disagreed. It recognized that "[t]hat part of its production which 'Alcoa' itself fabricates, does not of course ever reach the market as ingot . . ." *Id.* Nevertheless, Judge Hand contended that this ingot "necessarily had a direct effect upon the ingot market." *Id.* The court concluded: "We cannot therefore agree that the computation of the percentage of 'Alcoa's' control over the ingot market should not include the whole of its ingot production." *Id.* For further discussion of *Alcoa* see notes 140-47 and accompanying text *infra*.

In *United States v. Continental Can Co.*, 217 F. Supp. 761 (S.D.N.Y. 1963), *rev'd*, 378 U.S. 441 (1964), the district court pointed to the fact that "[s]ome of the captive companies produce cans for their own use and also sell to other users." 217 F. Supp. at 773. The Supreme Court, however, without any discussion, made no attempt to distinguish between cans sold to outsiders and those used internally. 378 U.S. at 459.

⁶⁴ 295 F. Supp. 149 (D. Del. 1969).

⁶⁵ The court explained:

Pennzoil and Asarco do not agree on the relevant line of commerce in dealing with these sales. Pennzoil contends that the line of commerce should be sales to all fabricators, both captive and independent; Asarco contends that sales to independent fabricators is the proper realm of inquiry.

Id. at 156. In the face of this conflict, the court concluded:

In view of the ability of a controlling copper producer to regulate its captive fabricator's purchases from outside producers and the reluctance of outside producers to rely on an ability to sell any substantial quantity of copper to captive fabricators . . . the Court accepts Asarco's view that sales to independent fabricators is the relevant line of commerce.

Id. See *British Oxygen, Ltd.*, No. 8955 (F.T.C. Oct. 18, 1974) (Administrative Law Judge concluded that "industrial gases produced for in-house consumption are not part of this market as such gases are not resold in the market-place"); see note 110 *infra*.

⁶⁶ The significance of *General Dynamics* for present purposes is the recognition by all members of the Court that the universe utilized in determining the effect of an acquisition must reflect the competitive situation. *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974). Imports entering into a market are an essential segment of that market.

III

INCLUSION OF IMPORTS IN THE RELEVANT MARKET

Many cases have considered imports in evaluating the effect of an acquisition. These cases can be broken down into three basic categories: (1) those including imports manufactured abroad by American companies; (2) those including all imports, regardless of source; and (3) those including goods produced by foreign companies at production facilities in the United States. However, the cases do not necessarily distinguish their results depending upon which of these situations exists.

A. *Cases Including Imports Manufactured by United States Companies*

There should be no question that all products sold by domestic companies are treated the same regardless of whether manufactured here or abroad. Two cases illustrate this. In *United States v. El Paso Natural Gas Co.*,⁶⁷ the Supreme Court recognized that Pacific Northwest, the acquired company, received large volumes of Canadian gas for its pipelines. This gas, in addition to other gas from domestic sources, gave the company "opportunities" which would permit ready entry into the California market and which required the district court to consider whether it was a potential competitor in the relevant market.⁶⁸ The Supreme Court further found that Pacific Northwest had the resourcefulness and eagerness to enter the California market and was a major market factor, since it had one of the two major interstate pipelines serving a nearby area.⁶⁹ Accordingly, it reversed the district court's judgment which had held the acquisition legal, and directed the lower court to order divestiture without delay.⁷⁰ In *Standard Oil Co. (New Jersey)*,⁷¹ the district court also dealt with the significance of imports by American companies. In considering the legality of the acquisition by Standard Oil of Potash Company of America, the court

⁶⁷ 376 U.S. 651 (1964).

⁶⁸ *Id.* at 652-54, 661.

Nineteen years earlier, Judge Learned Hand, in *United States v. Aluminum Co. of America*, 148 F.2d 416, 423-24 (2d Cir. 1945), a monopolization case under the Sherman Act, concluded with little discussion that ingot made by Alcoa in Canada through a wholly-owned subsidiary and imported into the United States should be included with Alcoa's domestic production. See notes 61-63 and accompanying text *supra*.

⁶⁹ 376 U.S. at 658-62.

⁷⁰ *Id.* at 662.

⁷¹ *United States v. Standard Oil Co. (New Jersey)*, 253 F. Supp. 196 (D.N.J. 1966).

found potash produced in Canada by American companies to be "in competition with potash mined in this country."⁷² The court, therefore, had no trouble including these imports in describing the size of the relevant market.⁷³

The decisions in *El Paso* and *Standard Oil (New Jersey)* seem eminently proper. Since, as will be discussed more fully below, the United States has frequently expressed an interest, supported by enforcement proceedings, in permitting the continued free flow of imports, imports should be considered part of the total market picture, particularly where the United States has some control over the companies because they are domestic concerns.

B. Cases Including All Imports Regardless of Source

There is much support for the proposition that all imports, regardless of their source, must be considered in determining the validity of an acquisition.⁷⁴ For example, in *American Smelting & Refining Co. v. Pennzoil United, Inc.*,⁷⁵ a case involving an acquisition in the copper industry, the district court was faced with the issue of whether "the proper index for measuring the participation . . . in this line of commerce" should be "domestic mine production" or "domestic copper consumption."⁷⁶ The court held that domestic consumption was the proper measure, but failed to

⁷² *Id.* at 199.

⁷³ *Id.* at 205. The court, however, did not stress that the imports were by domestic rather than foreign companies. It considered foreign companies relevant since it stated that a French company not yet selling in the United States was a potential entrant into the market because it had just started mining potash in Canada. *Id.* at 208.

⁷⁴ The principal support lies in the case law discussed hereinafter. The Department of Justice has stated that even the imports of foreign companies should be taken into account. In a 1973 speech entitled "The Antitrust Laws and Foreign Commerce," Keith I. Clearwaters, then Special Assistant to the Assistant Attorney General, explained the Antitrust Division's position as follows: "[F]or mergers among American firms, to the extent that tariff barriers do not make foreign competition unlikely, we take the competition of foreign firms into account in analyzing the effect of the domestic merger." Address by Keith I. Clearwaters before the Association of General Counsel, in Hot Springs, Virginia, May 4, 1973, in 5 TRADE REG. REP. ¶ 50,169 at 55,302-03 (1973). Often there is no controversy on the point and the court need not decide whether imports should be included. For example, in *United States v. Kennecott Copper Corp.*, 231 F. Supp. 95 (S.D.N.Y. 1964), *aff'd per curiam*, 381 U.S. 414 (1965), the Government argued for the inclusion of imports by stating that the universe should be determined by the consumption of refined copper. Since the defendant's theory led to essentially the same result, the court did not have to resolve the issue.

The Department's position is not always consistent, however. Recently, in arguing against airline pooling arrangements, it has indicated that it does not consider competition by foreign airlines significant. See notes 132-39 and accompanying text *infra*.

⁷⁵ 295 F. Supp. 149 (D. Del. 1969).

⁷⁶ *Id.* at 153.

mention in its decision whether the imports were by American or by foreign companies.⁷⁷ Since the amount of copper imported into the United States by foreign companies is not negligible,⁷⁸ the decision supports the inclusion of imports without regard to their source.⁷⁹

Other courts have also included imports without expressing any interest as to whether such imports were made by foreign companies. In *United States v. Standard Oil Co. (Indiana)*,⁸⁰ a federal district court stated that in determining the validity of contested acquisitions of domestic oil and gas reserves, "account must be taken of the fact that extremely large quantities of foreign crude oil are available to the domestic market."⁸¹ The court made no distinctions based upon the nationality of importing firms. Although it also considered production in the relevant market, the court concluded that "[t]he share of consumption in the relevant market is more meaningful than the share of production, since consumption represents the actual demand to be satisfied."⁸² Similarly, another district court, in *United States v. Bliss & Laughlin, Inc.*,⁸³ included imports when it denied a preliminary injunction to prevent an acquisition by the defendant corporation of Sierra Drawn Steel Corp. Noting a substantial increase in cold finished steel bars imported into the United States,⁸⁴ which enhanced competition in this line of commerce, the court displayed no concern with whether the sellers were domestic or foreign companies.⁸⁵

⁷⁷ *Id.* at 153-56.

⁷⁸ For example, during the year the case was decided—1969—the United States recovered 1,544,579 short tons of copper from domestically mined ores. 2 U.S. BUREAU OF MINES, DEP'T OF THE INTERIOR, MINERALS YEARBOOK 3 (1970). During the same year it consumed 382,169 short tons of imported copper. *Id.* at 32.

⁷⁹ In its discussion of the molybdenum industry, however, the district court did not find it necessary to take into account the activity of foreign producers, because it held that the acquisition was not anticompetitive in that business. 295 F. Supp. at 157.

⁸⁰ 1964 Trade Cas. ¶ 71,215 (N.D. Cal.).

⁸¹ *Id.* at 79,847.

⁸² *Id.* at 79,865.

⁸³ 202 F. Supp. 334 (S.D. Cal.), *vacated and remanded*, 371 U.S. 70 (1962), *on reconsideration*, 1963 Trade Cas. ¶ 70, 734 (S.D. Cal.).

⁸⁴ The court called attention to the fact that imports had increased from 761 tons in 1957 to approximately 8,983 tons in 1960, and in this same period imports entering the Los Angeles, San Francisco, Washington, and Oregon customs districts increased from four tons in 1957 to 918 tons in 1960. 1963 Trade Cas. at 76,167.

⁸⁵ *Id.* at 76,167; *see* Dresser Indus., 63 F.T.C. 250 (1963). In the latter case the hearing examiner, in dismissing the complaint, emphasized that "there exists an ample supply of imported crude barite," but nowhere indicated whether such imported barite was owned by domestic or foreign companies. *Id.* at 278. Production statistics were also utilized by the

In a number of other cases, imports by foreign companies have been explicitly included within the market. Courts have long utilized this approach in Sherman Act cases. In *United States v. Singer Manufacturing Co.*,⁸⁶ for instance, the Supreme Court, in measuring Singer's share of the United States market, included imports of machines manufactured by foreign companies because of their increasing competitiveness with domestic machines.⁸⁷

The section 7 cases have followed this rationale. In *United States v. Tidewater Marine Service, Inc.*,⁸⁸ the district court dealt with the alleged anticompetitive effect of the proposed merger of two companies supplying boats for transportation of supplies and equipment to offshore drilling sites. In the court's view, a significant argument by the defendants was that the combination of one company's international experience with the other's ocean towing capacity would "enable them to overcome the existing barriers to entry into the apparently burgeoning business of ocean towing of rigs—a market which is completely dominated by foreign firms with no real American competition."⁸⁹ This argument was found to be persuasive.⁹⁰

The FTC reached a similar result in *Diamond Crystal Salt Co.*⁹¹ when it modified an earlier order prohibiting Diamond from acquiring within ten years any producer or distributor of salt and approved the acquisition of an interest in a Panamanian Corpora-

hearing examiner. The decision was confirmed by the Federal Trade Commission. 63 F.T.C. 250 (1963).

⁸⁶ 374 U.S. 174 (1963).

⁸⁷ *Id.* at 176. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 245 F. Supp. 258 (M.D. Pa. 1965), *vacated*, 377 F.2d 776 (3d Cir. 1967), *rev'd*, 392 U.S. 481 (1968), presents an analogous situation. There the defendant urged as a defense to the antitrust claim that foreign machinery was available to the plaintiff. The district court held this was not a defense under the circumstances of that case since "no domestic non-United or foreign machines, comparable to United machines in capacity and performance, and for which there was service, parts and technical advice, were available to Hanover." *Id.* at 286. The court thus implied that foreign production might be relevant where foreign goods were sufficiently competitive with American-made products.

⁸⁸ 284 F. Supp. 324 (E.D. La. 1968).

⁸⁹ *Id.* at 342.

⁹⁰ The court added:

We realize, of course, that the mere existence of a valid business purpose for the merger, with possible limited exceptions inapplicable here, will not rescue the merger from the Clayton Act if it has a probable anticompetitive effect. . . . However, we do feel that where, as here, we find no anticompetitive effects, then the existence of a valid business purpose for the merger allays the inherent suspicion cast upon mergers by the Clayton Act.

Id. at 342-43 (citations omitted).

⁹¹ [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,027 (FTC 1969).

tion with title to a Chilean mine.⁹² It did so because it recognized that products are in competition if they are sold in the relevant market, whatever their source.⁹³

In *Litton Industries, Inc.*,⁹⁴ which involved the acquisition of a German company, Triumph-Adler, by Litton, products imported by other foreign companies were included in the market by the FTC, but only after considerable controversy. The hearing examiner, in upholding the acquisition of the foreign-based company, relied in part on the fact that such a foreign-based company could not ship substantial percentages of its typewriter production to the United States.⁹⁵ Complaint Counsel, in their brief to the FTC, contended that the examiner erred, pointing out that Triumph-Adler had made large shipments to the United States market and contending that the record showed no "substantial limitation on the ability of foreign companies to supply typewriters to the United States."⁹⁶ Indeed, foreign-based typewriter companies had continually increased their sales to customers in the United States.⁹⁷ In their brief, Complaint Counsel set out what they considered to be the essential criteria for determining whether a foreign company was an actual competitor in the United States market: "(1) whether its sales were increasing, (2) whether its geographic and customer coverage were expanding, and (3) its attitude toward the future."⁹⁸ They argued that in the present case these criteria had been met.⁹⁹ The FTC, after reviewing the facts as to the foreign company's business activities in the United States,

⁹² *Id.* at 21,276-78.

⁹³ According to the court, acquisition by respondent [Diamond] of an equity interest in [the Panamanian company] would provide respondent with certain access to Chilean rock salt supplies which would in turn enable it to become a more effective competitor in the East Coast market and open up the West Coast market for the first time to rock salt in competition with other products.

Id. at 21,278.

⁹⁴ 82 F.T.C. 793 (1973).

⁹⁵ [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,918 (FTC 1972).

⁹⁶ Brief for Complaint Counsel in Support of Appeal from Initial Decision at 24, *Litton Indus., Inc.*, 82 F.T.C. 793 (1973).

⁹⁷ *Id.*, Brief at 25.

⁹⁸ *Id.*, Brief at 28.

⁹⁹ *Id.*, Brief at 29. Counsel contended that foreign companies had profitable businesses, excellent customer relations, and steadily increasing advertising in the United States. It further contended that the companies had introduced "significant new" machinery and were "backed by efficient production and an effective research and development program." *Id.*, Brief at 30; see *id.*, Brief at 81, 91. Finally, counsel pointed out that the percentage of sales of foreign companies had increased markedly and that Triumph-Adler and foreign typewriter companies maintained offices in the United States. *Id.*, Brief at 25, 29-30, 81, 91.

adopted Complaint Counsel's reasoning and found that the typewriter manufacturers competing in the United States included six foreign-based companies.¹⁰⁰

C. *Treatment of Foreign Companies with Major Facilities in the United States as Domestic Companies*

In addition to holding that imports should be considered in cases where a domestic company seeks to acquire a foreign one, the *Litton* case illustrates another important point—that foreign companies with domestic facilities are generally treated the same as purely domestic companies. Complaint Counsel in *Litton* stated that one of the foreign companies in the industry, Olivetti, “maintains a modern typewriter plant in Harrisburg, Pennsylvania, and is not regarded as a ‘foreign-based’ firm for purposes of this discussion.”¹⁰¹ The FTC accepted this contention and treated Olivetti as a domestic company, pointing out that Olivetti sold typewriters throughout the United States and had a United States manufacturing facility.¹⁰² This approach is in accord with that recently expressed by the Department of Justice in its treatment of British Petroleum.¹⁰³

The problem of how to deal with British Petroleum under the antitrust laws first arose in *United States v. Atlantic Richfield Co.*¹⁰⁴ Its subsequent history presents an interesting situation, perhaps raising more questions than it answers. The action against Atlantic Richfield was brought by the Government because of the acquisition by Atlantic Richfield of the Sinclair Oil Company. The district court granted a preliminary injunction finding a reasonable likelihood that the acquisition would in a certain geographic market show an anticompetitive effect.¹⁰⁵ To “undo” that anticompetitive effect, Atlantic Richfield agreed to sell to British Petroleum all the marketing properties of Sinclair in the northeastern states, the section of the country where the probable anticompetitive effect had been found.¹⁰⁶

¹⁰⁰ 82 F.T.C. at 987.

¹⁰¹ Brief for Complaint Counsel, *supra* note 96, at 81.

¹⁰² Olivetti had previously acquired an American company. 82 F.T.C. at 989-90.

¹⁰³ See *United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061 (S.D.N.Y. 1969), *aff'd sub nom.*, *Bartlett v. United States*, 401 U.S. 986 (1971); *United States v. British Petroleum Co.*, 1970 Trade Cas. ¶ 72,988 (FTC). For a discussion of the position maintained by Antitrust Division officials see notes 111-12 and accompanying text *infra*.

¹⁰⁴ 297 F. Supp. 1061 (S.D.N.Y. 1969), *aff'd sub nom.*, *Bartlett v. United States*, 401 U.S. 986 (1971).

¹⁰⁵ 297 F. Supp. at 1074.

¹⁰⁶ 297 F. Supp. 1075 (S.D.N.Y. 1969) (second decision in same case). The elimination

British Petroleum was a wholly-owned subsidiary of a British company, British Petroleum Limited, which the court described as "among the seven largest integrated oil companies in the Western World."¹⁰⁷ It pointed out that the parent company, although having refining and marketing facilities in many parts of the world, "has been unable thus far to enter and compete in the United States market, though it has long desired to do so."¹⁰⁸ The court approved the acquisition, declaring that "[i]f the purchase agreement is carried out, [British Petroleum, Limited] will, for the first time, become a competitor in the United States market through its subsidiary [British Petroleum]"¹⁰⁹ This, according to the court, would increase competition by substituting "a new and viable competitor for Sinclair in the Northeast."¹¹⁰

of Sinclair through the merger would substantially lessen competition in the gasoline market in the northeast. Both Atlantic Richfield and Sinclair competed in the northeastern United States with market shares exceeding those held illegal in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) and *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); both were "integrated" and wielded "very substantial economic power." 297 F. Supp. at 1064, 1072. In addition, the industry in that area had evidenced a merger trend, high entry barriers, increased concentration, and decreased competition. *Id.* at 1072.

¹⁰⁷ *Id.* at 1065.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1068. Similarly, the Government did not attack the proposed acquisition by Lloyds Bank, a large British bank, of the First Western Bank, a large California bank. It considered Lloyds a source of "new competition in our domestic markets." Statement by Donald I. Baker, Director of Policy Planning, Antitrust Division, Prepared for Delivery at a Symposium on Inter-relationship Between Multi-National Firms and Governments at UCLA, Nov. 16, 1973.

Cf. British Oxygen, Ltd., No. 8955 (F.T.C., Oct. 18, 1974) (initial decision). British Oxygen was found to be the leading manufacturer of industrial gases in the United Kingdom, which produced and marketed industrial gases in many other countries, but not in the United States. It "was the only one of the three largest industrial gases companies in the world that was not operating in the United States." *Id.* at 35. British Oxygen "was interested in becoming a nationwide competitor in the U.S. industrial gases market" (*id.* at 22), and "was recognized by members of the industrial gases industry in the United States as one of the few firms possessing the capital resources, technical knowledge and expertise and marketing capability required to successfully enter the U.S. industrial gases market." *Id.* at 35, 92. Further, the judge found it "was clearly feasible for [British Oxygen] to enter the industrial gases market in the United States. . . ." *Id.* at 50, 92. On these bases the judge concluded that British Oxygen "was a perceived potential entrant into the U.S. industrial gases market" (*id.* at 93), and in fact was likely to enter the market (*id.* at 96), and since British Oxygen exerted a beneficial influence on the market, its acquisition of a large United States company in that market was a violation of the antitrust laws. *See id.*

It should be noted that British Oxygen was not a total stranger to the United States. It had engaged in a joint venture in the United States with the acquired company (*id.* at 8) and had sold other products in the United States through its American subsidiaries. *Id.* at 60. For a summary of the case see 3 TRADE REG. REP. ¶ 20,746 (FTC, Oct. 18, 1974).

Subsequently, the union of the United States subsidiary, British Petroleum, and Standard Oil of Ohio (Sohio) was proposed. According to Judge Richard McLaren, then the Assistant Attorney General in charge of the Antitrust Division, "BP was in effect an American concern with a substantial business in the United States."¹¹¹ Consequently, he explained, the Antitrust Division "analyzed the merger proposal precisely the same way we would have analyzed a proposal to unite Sohio with another American company in the position of BP's American subsidiary."¹¹² The government therefore brought an action,¹¹³ which was ultimately settled by consent.¹¹⁴

It is apparent from the Government's treatment of British Petroleum that a foreign company with sufficient resources to enter the United States market, but with a present inability to do so, will not be considered a part of that market.¹¹⁵ However, once a foreign company has entered into the United States market, it should not be accorded different treatment because it is based abroad.¹¹⁶

¹¹¹ The Government's approach was discussed by Judge McLaren while he was Assistant Attorney General in charge of the Antitrust Division, in his speech on "Antitrust Policy Today." Address Before the National Industrial Conference Board 7, March 5, 1970. These comments subsequently were quoted with approval by another Justice Department official. See Address by Donald I. Baker, Director of Policy Planning, Antitrust Division, Before the Committee on International Law of the New York City Bar Ass'n and the American Branch of the International Law Ass'n, March 16, 1973, in BNA ANTITRUST & TRADE REGULATION REPORT No. 53, at B-2 (March 19, 1973).

¹¹² McLaren, Address, *supra* note 111.

Some courts have chosen not to adopt the Antitrust Division's analogy. In *United States v. Crocker-Anglo Nat'l Bank*, 277 F. Supp. 133 (N.D. Cal. 1967), a case involving the acquisition of Citizens National Bank by Crocker-Anglo, the district court considered the effect of foreign banks on competition in the California market. The court insisted upon calling such banks "foreign," although they "already [had] offices, and in one case, nine locations, in California." *Id.* at 164. It concluded that the Government's proof had failed and held the acquisition legal because, *inter alia*, the banks' share of any relevant market was too small. Indeed "[a]n adjustment for available resources of foreign bank subsidiaries and representatives . . . would result in a further reduction." *Id.* at 180. Regardless of the terminology employed, therefore, the substantive effect of the treatment of British Petroleum and "foreign" banks was the same; both were considered to be in the relevant market.

¹¹³ *United States v. British Petroleum Co.*, Civil No. 69-954 (N.D. Ohio 1969).

¹¹⁴ 1970 Trade Cas. ¶ 72,988.

¹¹⁵ See notes 108-10 and accompanying text *supra*. See also W. FUGATE, *supra* note 8, at 351.

¹¹⁶ See *British Oxygen, Ltd.*, No. 8955 (F.T.C., Oct. 18, 1974) (Administrative Law Judge treated British Oxygen as domestic company in lines of commerce in which it made sales in United States through domestic subsidiaries); see note 110 *supra*.

IV

AUTHORITIES RAISING A DISTINCTION BETWEEN DOMESTIC
AND FOREIGN COMPETITION

Wilbur Fugate, formerly Chief of the Foreign Commerce Section of the Antitrust Division, has written that in section 7 cases "[i]mports have been treated the same as domestic manufacture thus far."¹¹⁷ In his view, however,

there is room for distinction. Imports are much more subject to being cut off, and they can be cut off merely by a decision of the foreign producer. Likewise they can be cut off by tariffs and other governmental trade barriers.¹¹⁸

Yet no section 7 case decided since *Brown Shoe* has taken the stance that only domestic companies may be included within the relevant market.¹¹⁹

As mentioned previously, some cases, not involving imports, consider production as well as sales data in determining the validity of an acquisition.¹²⁰ Some cases involving imports also take this

¹¹⁷ W. FUGATE, *supra* note 8, at 351.

¹¹⁸ *Id.*

¹¹⁹ *Cf.* Vanadium-Alloys Steel Co., 18 F.T.C. 194 (1934). There the FTC, in finding a violation of § 7 of the Clayton Act, considered respondent's share of domestic production. *Id.* at 203. In so doing it pointed out:

There are approximately 24 domestic manufacturers of tool steel in the United States, and 7 foreign manufacturers of tool steel sell their products in this country. Of the 24 domestic manufacturers, 15 of these are the significant factors in this industry and manufacture, according to informed opinion, about 90 percent of the domestic tool steel in this country.

Id. at 202.

When courts fail to consider foreign production, the explanation can often be found in a lack of familiarity with statistics relating to such production. For example, in some cases the courts have relied on statistics collected by the Bureau of Census, which collects data solely from United States companies, and on trade associations, which often do not include foreign companies. *See, e.g.,* United States v. Continental Can Co., 378 U.S. 441, 459-60 n.10 (1964).

In the recent Sherman Act case, *Honeywell Inc. v. Sperry Rand Corp.*, 180 U.S.P.Q. 673 (D. Minn. 1973), the court definitively excluded imported products from the market. The court found that "the geographic market is the United States and foreign markets for sales or rentals of EDP [electronic data processing] products manufactured in the United States." *Id.* at 746. However, the case must be distinguished for several reasons. First, the issue arose under the Sherman Act, not the Clayton Act. Foreign markets for United States products have long been recognized as appropriate markets in a Sherman Act case. *See, e.g.,* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 706-07 (1962). Second, at issue was the question of the validity of the original computer patent in the United States. A valid patent is a lawful monopoly only within the country where the patent is issued. Third and most significant, the record showed that there were no significant producers of EDP products outside the United States; hence foreign manufacturers were irrelevant. *Id.* at 734-36.

¹²⁰ *See* notes 45-55 and accompanying text *supra*.

approach and thereby exclude foreign companies from the "production" universe. In *Standard Oil Co. (New Jersey)*,¹²¹ the court's discussion touched on production statistics, but did not seem to rely on them.¹²² In *Standard Oil Co. (Indiana)*,¹²³ the court specifically referred to the defendant's share of domestic production at two points in its opinion.¹²⁴ In neither case was the volume of imports found to be determinative—*i.e.*, not compelling one result if imports were included and another if they were excluded. Therefore, they do not answer the question of what would happen if the "numbers" had been against the defendant without imports but in its favor with imports.

Within the last few years, however, the antitrust enforcement agencies have sought to exclude imports in measuring market shares in some cases. None of these cases has been finally litigated to date, but they represent a significant attempt to change the existing law. In a complaint filed against Rockwell International Corporation in 1971, the FTC charged a violation of section 7 by reason of the acquisition of one American machinery manufacturer by another domestic manufacturer, in a market in which there was a large volume of imports.¹²⁵ Complaint Counsel in the resulting case contended that there existed "two separate markets,"¹²⁶ explaining that: "[o]ne, quite clearly, is of sales in the United States, whether of domestically made or imported machinery. The other market is the total production by U.S. manufacturers, including both domestic sales and exports."¹²⁷ Complaint Counsel cited no authority to support their second market, which excluded imports. They argued that "foreign manufacturers cannot be treated as if they were identical to domestic manufacturers," because imports might in the future be limited by tariffs, a currency revaluation, or even a ban, and that United States buyers

¹²¹ *United States v. Standard Oil Co. (New Jersey)*, 253 F. Supp. 196 (D.N.J. 1966).

¹²² *Id.* at 208; see notes 72-73 and accompanying text *supra*.

¹²³ *United States v. Standard Oil Co. (Indiana)*, 1964 Trade Cas. ¶ 71,215 (N.D. Cal.).

¹²⁴ *Id.* at 79,854, 79,859. See also *Dresser Indus., Inc.*, 63 F.T.C. 250 (1963). There the FTC stated market percentages in terms of "total demonstrated domestic reserves available for the relevant market." *Id.* at 292. It also reported respondent's percentage of a universe consisting of total production in the relevant area plus imports. *Id.*

¹²⁵ *North American Rockwell Corp.*, [1970-1973 Transfer Binder] Trade Reg. Rep. ¶ 19,630 (FTC 1971).

¹²⁶ Trial Memorandum of Complaint Counsel, at 10, *North American Rockwell Corp.*, [1970-1973 Transfer Binder] Trade Reg. Rep. ¶ 19,448 (FTC 1971). Complaint Counsel's argument was couched in terms of the scope of the line of commerce, rather than in terms of what universe should be used in measuring respondent's position.

¹²⁷ *Id.*

would, if other factors were "relatively equal," prefer to purchase United States machinery.¹²⁸ In conclusion, Complaint Counsel contended that a "quite possible scenario" would be that some circumstance would occur that would create a "highly concentrated monopoly situation in the U.S. market."¹²⁹ Rockwell disagreed, pointing out that Complaint Counsel's "scenario" dealt with "possibilities" not probabilities, as required by the antitrust laws and, indeed, importers were consistently improving their position at the expense of American manufacturers.¹³⁰ The matter was settled before adjudication by the administrative law judge and therefore offers little guidance here.¹³¹

Despite the remarks by Justice Department officials quoted hereinafter emphasizing the significance of imports,¹³² the Anti-trust Division staff also has contended recently, in comments before the Civil Aeronautics Board,¹³³ that domestic companies are to be distinguished from foreign concerns and considered separately. In effect, the staff proposed dividing the aviation industry into two segments: domestic carriers and foreign carriers.¹³⁴

The comments were occasioned by an application by Pan American World Airways

to permit Pan American and its primary U.S.-flag competitor in North Atlantic air transportation, Trans World Airlines, Inc. (TWA) to engage in discussions of consolidation and/or coordi-

¹²⁸ *Id.* at 11.

¹²⁹ *Id.*

¹³⁰ Trial Memorandum of Respondent at 30-32, North American Rockwell Corp., [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,448 (FTC 1971).

¹³¹ Rockwell Int'l Corp., 3 TRADE REG. REP. ¶ 20,503 (FTC 1974). Since the termination of that proceeding, the FTC apparently has again sought to exclude imports from a market. It has challenged the acquisitions of one domestic wine producer by another in Coca Cola Bottling Co., 3 TRADE REG. REP. ¶ 20,587 (FTC, filed Sept. 10, 1974), contending that the acquisition would substantially lessen competition in production, distribution, and/or sale of wine products in the United States. The complaint relies upon three separate sets of statistics: (1) wine sales in the United States, (2) wine products sold in the United States, and (3) sales of domestically produced wine in the United States.

Cf. FTC Complaint, RSR Corp., 3 TRADE REG. REP. ¶ 20,566 (FTC, filed April 1, 1974). In the latter instance Complaint Counsel set up two relevant markets: (1) the "U.S. market," which it defined as including both United States-produced and imported lead, and (2) the United States secondary lead market, which was defined without any specific reference to imports. Based upon the data in the complaint, if there are any imports of secondary lead, they apparently were included.

¹³² See notes 158-63 & 193-95 and accompanying text *infra*.

¹³³ United States Department of Justice, Comments in Application of Pan American World Airways for Emergency Authorization of Carriers, No. 26516 (CAB, April 2, 1974).

¹³⁴ See *id.* at 5-6.

nation of their services and revenues on the many North Atlantic routes on which they compete.¹³⁵

The Division opposed Pan American's application, explaining in its Comments that the "general problem alleged [by Pan Am] is an excess of competition, apparently primarily foreign-flag competition, on the North Atlantic routes in issue."¹³⁶ The staff argued that federal regulatory agencies had determined in the past that competition among United States flag carriers "would maximize U.S. participation in the markets in question, and over the long run, those decisions have led to a high participation of U.S. carriers in the traffic in those markets."¹³⁷ The Comments completely separated the three domestic carriers from the twenty-one foreign carriers in the business and argued against the application as though the foreign carriers did not exist.¹³⁸ The Civil Aeronautics Board, however, did not agree with the Antitrust Division and granted Pan American's requests.¹³⁹

Language can be found in a few other cases supporting a distinction between domestic and foreign competition. One of the early cases to discuss this distinction was the *Alcoa* case,¹⁴⁰ decided under section 2 of the Sherman Act.¹⁴¹ In that case, the Government took the position that Alcoa had a monopoly in the aluminum industry because it was "the single producer of 'virgin' ingot in the United States."¹⁴² In contrast, the defendant argued "that the fact that it alone continued to make 'virgin' ingot in this country did not, and does not, give it a monopoly of the market; that it was always subject to the competition of imported 'virgin'

¹³⁵ *Id.* at 1.

¹³⁶ *Id.* at 7. There are three United States air carriers and 21 foreign air carriers providing scheduled passenger service between the United States and Europe.

¹³⁷ *Id.* The Division expressed its belief that "the interests of all persons affected by the international air transportation industry are better served by the present system of competition among U.S.-flag carriers than by pooling," (*id.* at 2), which it considered for "competitive purposes . . . tantamount to a merger of the two carriers for the routes involved." *Id.* at 4.

¹³⁸ It must be recognized that these air transportation cases can be distinguished because the cases arise not under the antitrust laws but under the Federal Aviation Act of 1958. 49 U.S.C. §§ 1301-1542 (1970). Indeed, nowhere in its Comments did the Division cite the antitrust laws; instead, it relied solely upon the language of the Federal Aviation Act. United States Department of Justice, Comments, *supra* note 133, at 5.

¹³⁹ CAB Order No. 74-4-104 (April 19, 1974) (unreported).

¹⁴⁰ *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

¹⁴¹ 15 U.S.C. § 2 (1970); see note 62 *supra*.

¹⁴² 148 F.2d at 423.

ingot.”¹⁴³ Judge Learned Hand, speaking for the Second Circuit, noted that from one standpoint the distinction between domestic and foreign competition might form a basis for regarding domestic competition as less important than foreign competition.¹⁴⁴ He stated that

the first is limited in quantity, and can increase only by an increase in plant and personnel; the second is of producers who, we must assume, produce much more than they import, and whom a rise in price will presumably induce immediately to divert to the American market what they have been selling elsewhere. It is entirely consistent with the evidence that it was the threat of greater foreign imports which kept “Alcoa’s” prices where they were, and prevented it from exploiting its advantage as sole domestic producer; indeed, it is hard to resist the conclusion that potential imports did put a “ceiling” upon those prices.¹⁴⁵

On balance, however, Judge Hand found other aspects of the distinction to be of greater significance, stressing that

within the limits afforded by the tariff and the cost of transportation, “Alcoa” was free to raise its prices as it chose, since it was free from domestic competition, save as it drew other metals into the market as substitutes.¹⁴⁶

The court considered this to be a monopoly within the meaning of section 2 of the Sherman Act.¹⁴⁷

In a section 7 case, *United States v. Crocker-Anglo National Bank*,¹⁴⁸ a federal district court, in dealing with the proposed acquisition of Citizens National Bank by Crocker-Anglo, emphasized the distinction between foreign and domestic competition in banking. In considering the relevance of the availability of foreign bank resources, the court rejected the argument that total resources of a foreign bank should be included in the universe “since a foreign bank, even more so than a statewide bank, cannot afford to risk all of its resources in a single market.”¹⁴⁹ Nevertheless, it pointed out that a foreign bank in California can shift its relative lending power from a branch in one country to a branch in

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 426.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 429.

¹⁴⁸ 277 F. Supp. 133 (N.D. Cal. 1967).

¹⁴⁹ *Id.* at 163.

¹⁵⁰ *Id.* at 164.

another.¹⁵⁰ The court determined that the difference in the abilities of domestic and foreign banks to concentrate resources was only one of degree. It only found it necessary to conclude that these foreign resources yet further diminished Crocker-Anglo's share of the market; therefore it concluded that the acquisition had to be held legal.¹⁵¹

Certainly *Alcoa* and *Crocker-Anglo* do not support the recent contentions of some antitrust enforcement personnel that imports can be ignored in evaluating an acquisition. If anything, they would support an argument that imports should be given greater weight than domestic production, because imports can be increased more readily. Nevertheless, even this type of argument would be inappropriate in a section 7 case. A future increase in imports is only a possibility—and should not be considered in determining the validity of an acquisition. Thus, imports should be given no greater, and no less, weight than locally-produced goods in anti-trust analysis.

V

THE REGULATORS' VIEW OF IMPORTS

As noted previously, it has suited the Government's purpose on several occasions of late, when proceeding against an acquisition involving two domestic corporations, to *exclude* imports from the relevant market in order to inflate market share statistics.¹⁵² Generally, however, the Government *includes* imports in the relevant market. In doing so, it properly recognizes the indisputable fact that imports are an essential part of United States commerce.

¹⁵¹ *Id.* at 199.

Joel Davidow, presently Chief of the Foreign Commerce Section of the Antitrust Division, has stated that in dealing with a merger involving a foreign company whose sales are based upon imports, one need not accept the market share figure of the firm as "equivalent to that of a firm with a plant in the U.S.," but that

[o]n the one hand, it might be considered that a 5% market share resulting solely from imports is highly unstable because of exposure to devaluation, tariffs and other international trade factors, and thus should be somewhat discounted in applying merger guidelines or other merger standards.

.....

On the other hand, there are situations in which a giant foreign firm which has only achieved minor import penetration of the U.S. market attempts to buy a firm here with a substantial market share. We might conclude in that instance that its U.S. market percentage significantly understates the competitive importance of the acquiring firms and insist that the merger be viewed as eliminating not only actual competition but a significant amount of potential competition.

Address by Joel Davidow, Fordham Corporate Law Institute, Nov. 12, 1974.

¹⁵² See notes 125-38 and accompanying text *supra*.

There is no question that all companies, domestic or foreign, selling in this country are engaged in commerce in the United States.¹⁵³ Evidence that the Government regards imports as an essential part of United States commerce can be found in the Justice Department's challenge to the acquisition of an importer by another importer and distributor in *United States v. Schenley Industries, Inc.*¹⁵⁴ The action was terminated by a consent decree requiring divestiture and limiting future acquisitions of any companies which have "the right to produce and sell or the right to import and sell" the product involved.¹⁵⁵ Similarly, the complaint in another case challenged the acquisition of the largest importer of the product involved by a domestic seller of the product, and resulted in divestiture pursuant to a consent decree.¹⁵⁶

Certainly, since imports are such an essential part of United States commerce, to exclude them in determining the size of the market seems completely unrealistic. Even the debates on passage of the Sherman Act show that Congress recognized an important relationship between imports and domestic competition.¹⁵⁷

A number of antitrust enforcement officials have emphasized this relationship in recent years. The impact of imports as "an important and significant competitive force"¹⁵⁸ was pointed out by Judge McLaren while he was Assistant Attorney General in charge of the Antitrust Division. He emphasized that "[w]here an existing domestic industry is highly concentrated, the main pressure on

¹⁵³ See, e.g., *United States v. Joseph Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal. 1966), *aff'd*, 385 U.S. 37 (1966). The district court pointed out that

[t]he continuous flow of Labatt beer from Canada to Labatt's distributors in the United States constitutes an engagement in foreign and interstate commerce by John Labatt Limited. . . . John Labatt Limited engages in commerce in the United States through its control of, and close business relationship with and assistance to, General Brewing Corporation [a domestic subsidiary].

253 F. Supp. at 138.

¹⁵⁴ 1966 Trade Cas. ¶ 71,897 (S.D.N.Y.).

¹⁵⁵ 1971 Trade Cas. ¶ 73,490, at 90,007 (S.D.N.Y.).

¹⁵⁶ *United States v. Insilco Corp.*, Civil No. C-304 (D. Conn., filed May 26, 1971), *terminated by consent decree*, 1974 Trade Cas. ¶ 74,877 (D. Conn.) (acquisition of flatware importer and seller Stanley Roberts by Insilco, large seller of stainless steel flatware).

However, Joel Davidow, Chief of the Antitrust Division's Foreign Commerce Section, has stated:

It is not clear, and not settled, whether Section 7 of the Clayton Act applies to foreign transactions or ones which affect only the export or import trade but not the domestic commerce of the U.S."

Address by Joel Davidow, *supra* note 151.

¹⁵⁷ K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 19 (1958); W. FUGATE, *supra* note 8, at 7.

¹⁵⁸ Address by Richard McLaren Before the National Industrial Conference Board, in New York City, March 5, 1970.

management to keep both costs and prices down may be the existence of actual and potential competition from foreign or multi-national firms."¹⁵⁹ Likewise, Donald I. Baker, Director of Policy Planning in the Antitrust Division, explained:

Foreign competition has proven particularly important to Americans in two circumstances. The first concerns the situation where most or all of the goods originate abroad. The second occurs where we have a sluggish domestic industry, which very much needs the spur of outside competition. The latter situation has been particularly apparent in a number of our large oligopolies—and, as a result, we have seen such products as small cars and stainless steel razor blades become available in this country largely because of the pressure of foreign firms selling here.

. . . [C]ompetition from foreign owned firms—here or abroad—can be a vital spur to competition in the U.S. market, and the Department of Justice welcomes it for that reason.¹⁶⁰

One of the Antitrust Division's principal goals, therefore, has been to ensure the accessibility of the United States market to foreign companies.

Mr. Baker has stressed that "[e]ven where the goods in question are produced in the United States, we have an important national interest in seeing to it that major foreign firms are not kept out of the United States market."¹⁶¹ Accordingly, it "is an important goal of antitrust policy to preserve this kind of foreign competition as a factor in the American market—and to deal with international cartels that prevent it from happening."¹⁶² This approach goes hand-in-hand with a "related type of antitrust enforcement . . . designed to preserve foreign firms as actual or potential competitors in the United States market."¹⁶³

This expressed interest is not just empty words.¹⁶⁴ Numerous

¹⁵⁹ *Id.* The same point was made subsequently by his successor, Walker G. Comegys, while still Deputy Assistant Attorney General. Statement Presented to Senate Subcommittee on Foreign Commerce and Tourism, *supra* note 7.

¹⁶⁰ Address by Donald I. Baker, *supra* note 111, at B-1 to B-2 (emphasis added); see Address by Donald I. Baker Before New York State Bar Ass'n Annual Meeting, in New York City, Jan. 24, 1973, in 5 TRADE REG. REP. ¶ 50,161, at 55,284-85 (U.S. Dep't of Justice 1973). See also Address by Thomas E. Kauper Before the New York State Bar Association, in New York City, Jan. 24, 1973, in 5 TRADE REG. REP. ¶ 50,160, at 55,280 (1973).

¹⁶¹ Address by Donald I. Baker, *supra* note 111, at B-1.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ The Justice Department has claimed success in its attempts to keep domestic markets open to foreign competitors. Keith I. Clearwaters, while Special Assistant to the

cases have been brought by the Department of Justice and the FTC challenging acquisitions of foreign companies by domestic concerns. In *United States v. Gillette Co.*,¹⁶⁵ for example, the Justice Department challenged the "acquisition by a dominant American razor manufacturer of a leading European electric razor manufacturer which had not yet entered the United States market."¹⁶⁶ *United States v. Joseph Schlitz Brewing Co.*¹⁶⁷ was a successful challenge under section 7 of the acquisition by Schlitz of the stock of Labatt, a foreign brewer with a United States subsidiary and with a large volume of sales in the United States.¹⁶⁸ As Mr. Fugate noted, "the court did not treat the case differently than a domestic merger. Further, while it was not important to the case, the court did not distinguish imported from domestic beer."¹⁶⁹

In the *Litton* case,¹⁷⁰ discussed previously,¹⁷¹ the FTC found the acquisition by Litton, an American company, of Triumph-Adler, a German company, to be a violation of section 7. The decision outlined the rapid rise of Triumph-Adler as a competitor in the American market from the time of its entry in the middle 1950's until the date of its acquisition.¹⁷² The FTC pointed out that

Assistant Attorney General, stated that "[b]ecause of [the Department's] continuing efforts to keep United States commerce free from restrictive business practices, a foreign company can market its product with confidence that it will not be subject to anticompetitive barriers." Address by Keith I. Clearwaters, *supra* note 74, 5 TRADE REG. REP. ¶ 50,169, at 55,302 (U.S. Dep't of Justice 1973).

¹⁶⁵ Civil No. 68-141 (D. Mass. 1968).

¹⁶⁶ Address by Donald I. Baker, *supra* note 111, at B-1.

¹⁶⁷ 253 F. Supp. 129 (N.D. Cal. 1966), *aff'd*, 385 U.S. 37 (1966).

¹⁶⁸ The action also attacked the acquisition of another unrelated United States company, Burgermeister Brewing Corporation. 253 F. Supp. at 131.

¹⁶⁹ W. FUGATE, *supra* note 8, at 345.

¹⁷⁰ *Litton Indus., Inc.*, 82 F.T.C. 793 (1973).

¹⁷¹ See notes 94-102 and accompanying text *supra*.

¹⁷² The FTC explained:

Triumph-Adler entered the United [States] typewriter market in the middle 1950's . . . and sold office electric and office manual typewriters and portable typewriters through an agent During the period 1963-1965, it established a nation-wide distribution system of its own in the United States and by 1968 had about 800-1,000 dealers in the United States

82 F.T.C. at 992. The FTC pointed out that "[t]he United States sales of Adler typewriters had experienced impressive growth, and the Adler office electric typewriter enjoyed a reputation for superior quality and reliability." *Id.* at 985.

The Hearing Examiner, on the other hand, had concluded that Triumph-Adler had not been a competitor in the United States typewriter market because foreign-based companies such as Triumph-Adler "could not ship substantial percentages of their typewriter production to the United States." [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,918 (FTC 1972).

In *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), the court explained that new manufacturers of shoe machinery had to be ready to service their

"at the time of its acquisition by Litton in early 1969, Triumph-Adler was a dynamic competitor with a strong international position and a substantial position in the United States typewriter market."¹⁷³ Thus the market share of the imported machines could not be ignored. Similar reasoning has formed the basis of other successful challenges to acquisitions of foreign companies.¹⁷⁴ Conversely, acquisitions by foreign companies—sometimes through United States subsidiaries—of American companies have also been attacked successfully by the United States antitrust enforcement agencies.¹⁷⁵

Imports are not only protected from adverse private action by section 7 enforcement, but perhaps more significantly by the scope of the Sherman Act¹⁷⁶ and the Wilson Tariff Act.¹⁷⁷ As far back as *United States v. Sisal Sales Corp.*,¹⁷⁸ the Supreme Court held that it had jurisdiction of "a contract, combination and conspiracy entered

machines. However, as "the experience of foreign manufacturers indicates, this has proved to be a serious stumbling block to those who have sought to compete with United." *Id.* at 325. Accordingly, where foreigners cannot compete and have not competed, they should not be included in the United States market.

¹⁷³ [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 20,267, at 22,299 (FTC 1973). The FTC made clear that it considered Litton and Triumph-Adler to be "direct competitors." *Id.* at 984.

¹⁷⁴ See, e.g., *United States v. United Fruit Co.*, 1958 Trade Cas. ¶ 68,941 (E.D. La.). This was a Sherman Act case, in which, *inter alia*, the acquisition by United Fruit of International Railways of Central America was challenged. The proceeding was terminated by a consent decree requiring divestiture of International Railways, as well as the creation of a new company capable of importing a substantial amount of competitive products into the United States, and prohibiting numerous unlawful practices. See also *United States v. Monsanto Co.*, 1967 Trade Cas. ¶ 72,001 (W.D. Pa.). This case challenged a joint venture formed in the United States by Monsanto with a German company Farbenfabriker Bayer, A.G. That action was terminated by a consent decree requiring divestiture of the American company's interest.

¹⁷⁵ *United States v. Asiatic Petroleum Corp.*, 1971 Trade Cas. ¶ 73,689 (D. Mass.); *United States v. Ciba Corp.*, 50 F.R.D. 507 (S.D.N.Y. 1970); *United States v. Aluminium Ltd.*, 1966 Trade Cas. ¶ 71,895 (D.N.J.); *United States v. Swiss Bank Corp.*, 1940-1943 Trade Cas. ¶ 56,188 (D.N.J. 1941); *Holderbank Financiere Glasis S.A.*, [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 20,229 (FTC 1973); *Imperial Chemical Indus., Ltd.*, [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,914 (FTC 1972). See notes 112-14 & 116 and accompanying text *supra*.

¹⁷⁶ The Sherman Act prohibits, *inter alia*, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations" (15 U.S.C. § 1 (1970)) and any monopoly or "attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2 (1970).

¹⁷⁷ The Wilson Tariff Act prohibits "[e]very combination, conspiracy, trust, [or] agreement . . . between two or more persons or corporations, either of whom . . . is engaged in importing any article . . . when such combination . . . is intended to operate in restraint of lawful trade or free competition." 15 U.S.G. § 8 (1970). This Act does not supersede the Sherman Act. See *United States v. R.P. Oldham Co.*, 152 F. Supp. 818, 821 (N.D. Cal. 1957).

¹⁷⁸ 274 U.S. 268 (1927).

into by parties within the United States and made effective by acts done therein.”¹⁷⁹ In the case at bar, the Court found that “[t]he fundamental object was control of both importation and sale of sisal and complete monopoly of both internal and external trade and commerce therein.”¹⁸⁰ It therefore held the agreements limiting imports illegal, relying on the provisions of the Wilson Tariff Act.¹⁸¹

In *United States v. General Dyestuff Corp.*,¹⁸² the court rejected the defendant's novel argument “that the agreements, designed to keep foreign chemicals from entry into the United States, cannot be deemed to be against public policy because they serve the same purposes as the tariff acts.”¹⁸³ The court explained that under the Sherman and Wilson Acts, it was the intention of Congress to subject “the imports of foreign commodities to public control and regulation and [prohibit] such control and regulation by private combination.”¹⁸⁴

Another attack on import restrictions was made in *United States v. Watchmakers of Switzerland Information Center, Inc.*¹⁸⁵ There the Government successfully challenged, under the Wilson Tariff Act

¹⁷⁹ *Id.* at 276.

¹⁸⁰ *Id.*

¹⁸¹ This was by no means the first decision in point. See, e.g., *United States v. American Tobacco Co.*, 221 U.S. 106 (1911). Recently, in *United States v. Glaxo Group Ltd.*, 409 U.S. 818 (1973), the Court attacked restrictions on licences granted to the United States companies by the defendants, British drug companies.

Justice Jackson's dissent in *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), another well-known Sherman Act case involving restraint on interstate and foreign commerce, suggested that restriction of foreign trade might require the application of rules different from those normally applied to restrictions on United States commerce. *Id.* at 606. In that case, the Court held illegal arrangements between a United States company and its foreign competitors limiting competition in the United States market. Justice Frankfurter's dissenting opinion succinctly explained the point of Justice Jackson's dissent: “[T]he circumstances of foreign trade may alter the incidence of what in the setting of domestic commerce would be a clear case of unreasonable restraint.” *Id.* at 605. The 1955 Report of the Attorney General's Committee on the Antitrust Laws agreed with Mr. Justice Frankfurter that

under the Rule of Reason, defendants may proffer evidence that their activities abroad constitute no undue restraint on our foreign commerce since, even absent the challenged conduct, trade and investment in a particular foreign area would be virtually impossible.

ATTORNEY GENERAL'S COMM. ON THE ANTITRUST LAWS, REPORT 83 (1955); see 341 U.S. at 605.

¹⁸² 57 F. Supp. 642 (S.D.N.Y. 1944).

¹⁸³ *Id.* at 649.

¹⁸⁴ *Id.* See also, *United States v. National Lead Co.*, 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

¹⁸⁵ 1963 Trade Cas. ¶ 70,600 (S.D.N.Y.).

and section 1 of the Sherman Act,¹⁸⁶ conduct by Swiss and American defendants which imposed what it described as "unreasonable restrictions on the manufacture [and] imports of watches" and similar equipment in the United States.¹⁸⁷

In *Northern Natural Gas Co. v. FPC*,¹⁸⁸ the court had to determine the validity of a "joint venture [which] appear[ed] to have effectively prevented competition from arising among natural gas suppliers selling to distributors in Michigan and Wisconsin, and between the supplier of Canadian gas and those suppliers seeking to market domestic gas."¹⁸⁹ It concluded that the joint venture was illegal under the antitrust laws since it had "substantial anticompetitive effects on the marketing of gas in the upper Midwest."¹⁹⁰ Similarly, in *United States v. Singer Manufacturing Co.*,¹⁹¹ another Sherman Act case, the Government was concerned with conduct which excluded certain imports from the United States. The Supreme Court held such conduct illegal.¹⁹²

Recent statements by Antitrust Division officials reiterate their interest in precluding any action which will limit imports. As Donald Baker has explained,¹⁹³ the Government's interest goes further—to *encourage* the flow of imports. He pointed out that goods imported by foreign firms should be utilized "as a spur for innovation and lower prices in American markets,"¹⁹⁴ and that foreign competition "has proven particularly important in some of our highly concentrated industries."¹⁹⁵ Among the recent cases

¹⁸⁶ 15 U.S.C. § 8 (1970); *id.* § 1.

¹⁸⁷ 1963 Trade Cas. ¶ 70,600, at 77,455 (S.D.N.Y.).

¹⁸⁸ 399 F.2d 953 (D.C. Cir. 1968).

¹⁸⁹ *Id.* at 963. The venture was challenged under § 7 of the Natural Gas Act. 15 U.S.C. § 17f (1970).

¹⁹⁰ 399 F.2d at 963.

¹⁹¹ 374 U.S. 174 (1968); *see* *United States v. R.P. Oldham Co.*, 152 F. Supp. 818 (N.D. Cal. 1957).

¹⁹² 374 U.S. at 174.

¹⁹³ Address by Donald I. Baker Before New York State Bar Ass'n Annual Meeting, in New York City, Jan. 24, 1973, in 5 TRADE REG. REP. ¶ 50,161 (U.S. Dep't of Justice 1973).

¹⁹⁴ *Id.*, 5 TRADE REG. REP. at 55,285.

¹⁹⁵ *Id.*

Our major concentrated industries in this country are a source of real public concern. Some advocate breaking them up into smaller units. . . . A better alternative may be to pursue the course followed in automobiles—to design our trade policies in such a way that strong foreign competitors serve as a genuine economic check on the efforts of even highly dominant, domestic firms. This may be important in pricing and is clearly important in technology. Attempts to close our borders to foreign products are bound to enhance the pressure for vast structural relief in the American economy.

Id. at 55,286.

cited by Mr. Baker to show the Government's action in support of this policy was the attack on an agreement between Westinghouse and Mitsubishi Electric Company.¹⁹⁶ In that case, which is still pending, the Government has challenged as highly "oligopolistic"¹⁹⁷ agreements covering both patented and unpatented products which it alleged had the broad effect of keeping the two companies out of each other's "home markets."

The argument has been raised that the Government itself can limit imports and, accordingly, imports should be treated differently.¹⁹⁸ An answer is found in *Standard Oil Co. (Indiana)*,¹⁹⁹ discussed previously.²⁰⁰ There the court, in determining whether the acquisition of domestic oil and gas reserves substantially lessened competition, states that it "must" take into account "the fact that extremely large quantities of foreign crude oil are available to the domestic market."²⁰¹ In doing so, it pointed out that there was a "Mandatory Oil Import Program" which it said "severely limits the importation of crude oil, natural gas liquids, unfinished oils,

¹⁹⁶ *United States v. Westinghouse Elec. Co.*, Civil No. C-70-852-SAW (N.D. Cal., filed April 22, 1970).

¹⁹⁷ *Id.*; see Address by Donald I. Baker, *supra* note 193. See also *United States v. Hercules Inc.*, 1973 Trade Cas. ¶ 74,530 (D. Del.). In this case a joint venture between Hercules Inc., of Wilmington, Delaware, and Mitsui Petrochemical Industries, Ltd., of Japan (with a wholly-owned subsidiary, Mitsui Petrochemical Industries (U.S.A.), Inc.), was challenged under § 7 and the Sherman Act. According to the complaint, Hercules and Mitsui agreed to the joint manufacture and sale of high density polyethylene in the United States and Mitsui refrained from competing with Hercules in the United States in polypropylene because of Mitsui's participation in the high density polyethylene joint venture. The action was terminated by a consent decree requiring dissolution of the joint venture. *Id.*

Other recent actions have also sought to bar discrimination against foreign importers by United States trade associations. See, e.g., *United States v. Material Handling Institute*, 1973 Trade Cas. ¶ 74,362 (W.D. Pa.); *United States v. American Soc'y of Mechanical Eng'rs*, 1972 Trade Cas. ¶ 74,028 (S.D.N.Y.). Both cases were terminated by consent decrees prohibiting such discrimination.

¹⁹⁸ See, e.g., *W. FUGATE*, *supra* note 8, at 351; notes 129, 151 and accompanying text *supra*. Imports have been controlled by statute under certain limited circumstances—e.g., if they constitute unfair competition. 19 U.S.C. § 1337 (1970). That section provides in relevant part:

Unfair methods of competition and unfair acts in the importation of articles into the United States . . . the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States . . . are declared unlawful.

. . . .

Whenever the existence of any such unfair method or act shall be established . . . the articles . . . shall be excluded from entry into the United States.

Id.

¹⁹⁹ *United States v. Standard Oil Co. (Indiana)*, 1964 Trade Cas. ¶ 71,215 (N.D. Cal.).

²⁰⁰ See notes 80-81 and accompanying text *supra*.

²⁰¹ 1964 Trade Cas. at 79,847.

and refined products.”²⁰² This did not concern the court because, as it stated, the Government

has the power at any time to lift those controls, in whole or in part, should crude oil supplies become less than adequate or crude oil prices become excessive. Except for [the Government’s] controls, overseas production is economically available to domestic refiners and consumers.²⁰³

The court held that the acquisition did not in fact substantially impair competition.

With the exception of petroleum imports, there is no indication that the United States government intends to implement drastic limitations on imports at this time. In his March 1973 International Economic Report, former President Nixon emphasized that the United States “must face up to more intense long-term competition in the world’s markets rather than shrink from it.”²⁰⁴ Outside of the area of energy policy, the present administration has shown no intention to depart substantially from that course.

To the extent that in the course of political disputes other governments may raise the spectre of limiting imports into the United States, the antitrust laws, as now written, cannot support the exclusion of existing imports in evaluating market shares. Such threats by foreign governments pose only a possibility of action; but the antitrust laws, it is clearly settled, are concerned with probabilities, not possibilities.²⁰⁵ They are concerned with the market as it is, or probably will be. Experience indicates that to ignore foreign competition in the United States market would be to ignore economic reality.

CONCLUSION

Despite repeated pronouncements by antitrust enforcement agencies to the effect that foreign concerns should be treated the

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ R. NIXON, INTERNATIONAL ECONOMIC REPORT OF THE PRESIDENT, March 20, 1973.

²⁰⁵ See, e.g., *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 537 (1973); *United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549, 555 (1971); *United States v. Phillipsburg Nat’l Bank & Trust Co.*, 399 U.S. 350, 365-66 (1970); *FTC v. Procter & Gamble Co. (Clorox)*, 386 U.S. 568, 577-78, 583-84 (1967); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 551-52 (1966); *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 594-95, 598 (1965); *United States v. Continental Can Co.*, 378 U.S. 441, 458 (1964); *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 170-77, 182 (1964); *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 362-63 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 323, 333 (1962); *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 589, 592, 597-98, 607 (1957).

same as domestic concerns if they are selling their products in this country, it is apparent that a degree of schizophrenia exists on this issue. The purpose of this Article has been to collect and analyze (1) the authorities which have either been faced with the question or have in their decisions dealt with the issue without specifically determining it, and (2) the pronouncements and conduct of the antitrust enforcement agencies in regard to this issue.

It is clear that the case authority supports the inclusion of imports in measuring the relevant market. Data including all sales in the relevant market are generally utilized in section 7 cases. Such sales data, rather than production data, are more appropriate to a section 7 case, since sales more accurately reflect the true competitive picture. Imports, regardless of source, should be treated no differently from other sales in the relevant market, because they also are a part of United States commerce and are generally as available to the market as domestic goods. To ignore foreign products sold in this country is to approach a complex economic issue wearing blinders.

Some antitrust enforcement authorities disagree with this position, apparently because they fear that consideration of imports in evaluating a section 7 case may lead to a monopoly or oligopoly in the United States, if at some time in the future such imports are eliminated. But, if this is indeed their concern, they should not seek a change in the law from the courts. They should instead urge Congress to enact appropriate safeguards.